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ABSTRACT

The courts are clear in their preference for inclusion, the legal and educational mandate to educate handicapped students in the least restrictive environment. However, the implementation of inclusion programs is often unclear. In this publication, the superintendent of Baltimore County, Maryland, describes the school district's experiences in developing an equitable inclusion policy in compliance with the Individuals with Disabilities Act (IDEA). A recently developed irony is that school districts are now insisting on more inclusion than some parents desire. School boards can play a critical role in building a districtwide vision for inclusion by: (1) developing goals for all district students; (2) replacing dual policies for general- and special-education students and teachers with single, comprehensive policies; and (3) creating a system of accountability that addresses the needs of all students. Policymakers should consider what benefits students most, and weigh that benefit with regard to all other students. Inclusion is the delivery system of the future, and school systems that embrace it will make life easier for their attorneys and themselves. (LMI)

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Inclusion: A Legal Mandate, An Educational Dream

by Stuart Berger

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Inclusion: A Legal Mandate, An Educational Dream

by Stuart Berger

Equity with excellence — excellence with equity. No matter which way one states these twin, almost paradoxical goals, they have become the current major educational goals, actually a single goal. Yet, there is obviously a tension within this goal. Nowhere is the tension more apparent than in the concept of inclusion.

Inclusion — the legal and educational mandate to educate handicapped students in the least restrictive environment — is often used as a synonym for mainstreaming. In fact, they are not synonymous. Mainstreaming is based on the assumption that handicapped students will receive their education in restrictive environments, and they will be placed in regular environments, "mainstreamed", only as much as their handicapping condition will allow. Inclusion, on the other hand, is based on the assumption that handicapped students will receive their education within the regular school program (i.e., they will be included) and they will be placed in a more restrictive environment only after the school system has adapted the program and provided additional resources which still do not provide a benefit to the student, are too costly, or cause too much of a negative impact on other students.

After only a couple of months on the job, Stuart Berger was told that his county had the most restrictive special education program in the state that was ranked forty seventh nationwide in the amount of inclusion it provided. It was clear that Baltimore County was not in compliance with IDEA and, more importantly, that this level of restriction was not in the best interest of the students. As a result, Baltimore County began its push for inclusion.

While one could reasonably argue that the law is clear, its implementation certainly is not. Often individual parents of handicapped children desire, indeed insist, that their child be included. The school system is, however, usually resistant to inclusion because of limited financial resources, administrative inertia, and opposition from teachers and parents of other students.

Having arrived in Baltimore County in July of 1992, as Superintendent of Schools, I was handed a couple of months later an Office of Civil Rights (OCR) compliance review which stated, in essence, that inclusion was not prevalent in Baltimore County and the school system was not complying with the law. The Director of Special Education informed me the school system had the most restrictive special education program in the state and Maryland was forty seventh in the amount of inclusion provided.

It was clear to both of us that the school system was not in compliance with the Individuals with Disabilities Education Act (IDEA) and fighting OCR would be futile. More importantly, we recognized that the level of restrictiveness was not in the best interest of students.

The Baltimore County experience, along with a few others, shows that inclusion has evolved so that occasionally role reversal occurs - the school system supporting and the parents opposing inclusion. Nevertheless, the best instruction for all students, actually each student, must be paramount.

The IDEA provides that each State must establish *(P)rocedures to assure that to the maximum extent appropri-*

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ate children with disabilities — are educated with children who are not disabled and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily....

The Act assures each handicapped child substantitive and procedural due process. Like any other statute, judicial interpretation is not always easy. It is this difficulty of interpretation which has spurred costly administrative hearings and lawsuits.

Indeed, the IDEA places an enormous financial burden on states and local school districts. No less a school district than the much heralded Montgomery County, Maryland School System has spent over fourteen million dollars because of the system's inability to meet the Act's procedural requirements.

This financial "burden" is basically caused by two aspects of the law: (1) the state's and school district's obligation to pay for private education when an appropriate public education is not available, and, (2) the modification of program and provision of additional services as a byproduct of inclusion. Nonetheless, the law is clear in its preference for inclusion. In fact, courts routinely place the burden on school systems to prove any placement outside of regular education. In Sacramento School District v. Rachel H., 14 F. 3d 1398 (9th Circuit 1994), the Court states that "...the District's proposition that Rachel must be taught by a special education teacher runs directly counter to the congressional preference that children with disabilities be educated in regular classrooms with children who are not disabled." This preference requires that school systems provide supplementary aids, support services, and curricular modification.

Even where little academic achievement can be expected or has been achieved, courts continue to push for inclusion. One court said "(w)e caution, ..., that academic achievement is not the only purpose of mainstreaming. Integrating a handicapped child into a nonhandicapped environment may be beneficial in and of itself."

Clearly that philosophy motivated the Baltimore County decision to push for inclusion. While the law is clear, so too are the benefits of inclusion. Many students who had mild learning disabilities were being bussed miles from their homes; their opportunities to interact with neighborhood peers were greatly limited. The whole move to inclusion appeared to be logical educationally and legally.

But the opposition was swift, strong, and steady. Parents objected because of previous negative experiences with the local school. Teachers objected for a number of reasons, but couched those fears in an argument of lack of training. Ultimately, this opposition led to the filing for a temporary restraining order (TRO) by individual parents, a learning disabilities association, and the teachers union.

The Baltimore County School System was moving only about one-third of the students with special needs to neighborhood schools, and those were done with parental agreement. But as pointed out in *School Board News*, (Volume 14, No. 23, December 13, 1994, page 1), inclusion is a cultural shift, not a policy shift. That cultural shift had by no means taken place in Baltimore County.

Despite assurances to the contrary, some parents thought the school system intended to close the special schools believing school officials felt that all students belong in regular classrooms. This is untrue. Indeed, mainstreaming a child who will suffer from the experience would violate the Act's mandate for a free appropriate public education.

The Ninth Circuit has developed a four-part test that seems to capture the requirements of most courts. The test involves determining (1) the academic benefits of mainstreaming (inclusion is a term the courts use sparingly), (2) the nonacademic benefits of mainstreaming, (3) the possible negative effects of the student's presence on other teachers, and (4) the cost.

Actually, if the school district can show that inclusion has a significant negative effect in any of the four test areas, a segregated setting will be approved. Courts have routinely held the nonacademic benefits of inclusion are sufficient to justify inclusion, but they do recognize that often social gains are so small they do not justify an inclusionary setting. And, courts are becoming more willing to weigh the impact of inclusion on other students. Unfortunately, no case appears to stress the benefit to "regular" students of learning tolerance, respect, and understanding by being exposed early to handicapped individuals. The Baltimore County experience has shown tremendous positive benefit to all students, especially through an extensive peer assistance program.

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Given the current economic situation, courts will allow the cost of inclusion to be an important variable. One court opinion stated that if the cost of educating a handicapped child in a regular classroom is so great that it would significantly impact upon the education of other children in the district, then education in a regular classroom is not appropriate and that in the eyes of the school official, each child is equally important and each child is equally deserving of his share of the school's limited resources. Thus, the Act's preference for inclusion is not without clear limitations.

What is equally clear is that the provision of services for handicapped students falls on a continuum. The essence of the statute is the individuality of each student, and, thus, an array of options must be available.

This continuum of services can be offered in a variety of placements with the regular classroom being the preferred placement. Even so, courts realize that handicapped children can be placed in separate facilities. As more seriously disabled students are placed in regular classrooms, the provision of educational services becomes more difficult. Educators worry about the disproportionate amount of time necessary to adapt the regular classroom instructional program to the needs of handicapped children. Nevertheless, the courts often insist on significant modification.

Most school districts are beginning to recognize the necessity for altering programs. Nationally, while some severely handicapped children are in regular classrooms, many more are in separate classrooms in regular school facilities. For instance, Baltimore County had eight special schools in 1992, six in 1994, and will have four in 1996. While the population of handicapped students has not declined, these students are being educated in school buildings with their non-handicapped peers.

The initial assignment of special education students into regular schools goes a long way in satisfying courts. Obviously, such assignments reflect the preference for inclusion. Often, too, practicality weighs in. The courts, however, are usually realistic and are likely to try to balance interests within the spirit of the Act. While this article may have given the impression that judges are often simply taking the place of educators, usually judges try hard to avoid that trap. In fact, great deference is to be shown school officials in determining student placements.

School officials must be certain that procedures have not only been scrupulously followed, but that the procedures not only appear fair but, indeed, are fair. What courts must do is assure compliance with the Act.

Essentially, the Act goes to great lengths to protect the rights of individual students. While either party can invoke a "due process hearing," the burden of proof always rests with the school system. The convergence of this burden of proof with the deference to school district officials becomes the focal point of most due process hearing inquiries. At that point, it is essential that the school system has followed the process.

Unlike other administrative hearings, the administrative agency (the school system) in special education due process hearings is bound by the decision of its hearing officer. Thus, once the issue leaves the local school, the educators have virtually lost control of the situation. For that reason alone, school officials should do everything they can to resolve conflicts regarding the service provision site. (Obviously, sometimes parents are unreasonable in their demands and school officials cannot resolve the situation, but this conflict occurs more often in the context of private placements.) Put more eloquently, "...the special character of actions under the IDEA would seem to present enhanced opportunities for consensual and cooperative dispute resolution." (*Lewis v. School Board of Loudon County*, 806 F. Supp. 523, 528 (E.D. Va. 1992)

Despite a desire to resolve conflict, it is not always possible. Nonmeritorious lawsuits will be filed although some of them appear to be frivolous. Nevertheless, in the area of inclusion most conflicts can be resolved. An interesting irony, however, has been slowly developing. That irony is a role reversal in which school districts are now insisting on more inclusion than some parents desire. When school officials in Baltimore County moved toward inclusion, they believed that the parents of the students would be their staunchest allies; events proved that belief incorrect in some cases. Actually, some parents fought inclusion because they thought it would result in a reduction of services. (Others favored the school system position.) Ultimately, inclusion was implemented successfully for many students, and it is no longer a particularly contentious issue in Baltimore County.

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Privatization Update

EAI - Dade County, Florida has ended its "pioneering" agreement with private school administrator Education Alternatives, Inc., effective at the end of the 1994-95 school year. Although the contract has not been renewed, Dade County says it will retain most of EAI's reforms. Additionally, EAI's continued contract with the Baltimore City Public Schools is being questioned and its plans for districtwide reform in Hartford have been significantly reduced.

Privatization goes international: *Education Week* (Vol.XIV, No. 37, 6/7/95) reported that The Sabis Foundation, headquartered in Vaduz, Lichtenstein, will soon begin operating, under charter, an elementary school in Springfield, Massachusetts.

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Moreover, school officials learned a great deal from the experience.

The Baltimore County School System has not been the only one to experience this role reversal. A recent New Hampshire case saw a judge uphold an inclusion placement over the objections of parents. Not only did the judge uphold the school system; he actually praised school officials.

It is this "turnabout" which will probably have the greatest impact on school attorneys in the future. Historically, school systems have usually advocated for the more restrictive placements, but this position is changing. As it changes, the strategy and arguments of school attorneys will necessarily change.

What is important to remember, however, is that both parties in this type of dispute want what benefits the student most. School officials, of course, must weigh that benefit with regard to thousands of other students - a responsibility which parents can legitimately ignore. Nevertheless, inclusion is the delivery system of the future, and school systems which embrace it will make life easier for their attorneys and, ultimately, for themselves.

Stuart Berger

"Most school districts are beginning to recognize the necessity for altering [special education] programs. ... [special education] students are being educated in school buildings with their non-handicapped peers."

School boards need to address Inclusion.

School boards can play a critical role in developing a district-wide vision for inclusion. Local boards need to:

- develop goals for all district students;
- replace dual policies for general and special education students and teachers, with single, comprehensive policies;
- create a system of accountability that addresses the needs of *all* students.

By supporting site-based management and considering the needs of students with disabilities in their policy decisions, the board further supports inclusion. Treating students with disabilities like other students in the district can ensure that the spirit of IDEA is not violated by local bargaining agreements.

And, by working with public agencies on behalf of students with disabilities, boards serve as advocates for these students. ■

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A longer version of this article was presented at the Annual School Law Seminar, San Francisco, California, March 31 - April 1, 1995, sponsored by NSBA Council of School Attorneys.

ADVOCACY IN ACTION

Congress in proposing cuts in the federal commitment to education of a magnitude never before considered. On July 21, the House Appropriations Committee slashed 3.9 billion dollars from education, affecting nearly all programs. These deep cuts in education funding will do extensive and immediate damage to the educational opportunities of millions of America's children, youth and adults and will significantly reduce long-term economic productivity and growth. The cuts include: $1.2 billion (17%) cut from Title I; $282 million (59%) from Safe and Drug-Free Schools; $366 million (23%) from Vocational Education; $83 million (11%) from Impact Aid. Overall, Education received one of the largest percentage cuts of any federal program — non-education programs are seeing 3% cuts.

NSBA has denounced these cuts and is urging Congress to make children a priority. Deficit reduction and a balanced budget can be achieved without jeopardizing education. NBA is calling on education advocates to contact their members of Congress and the media immediately and to gear up for a concerted campaign in August and September when decisive votes will take place on the Education Appropriations bill.

For more information, call the NBA legislative hotline at 1-800-609-NBA. In addition to recorded updates, you can request further information from the Fax-On-Demand Library:

Order Doc. #227 for a list of FY 96 proposed cuts
Doc. #235 for a state-by-state list of the impact of cuts in several areas
Doc. #240 for a sample opinion editorial opposing cuts

To contact your members of Congress, call the Capitol Switchboard at 202/224-3121. For more information, contact Michelle Richards, Federal Relations Network (FRN) Advocate at NSBA (703/838-6208)